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Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 768

Case No. 823: SHARSHARA

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, Vice-President, presiding; Mr. Francis Spain; Ms. Deborah Taylor Ashford;

Whereas, on 2 November 1994, on behalf of Mohammed Mohyiddin Sharshara, a deceased former area staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), hereinafter referred to as "the Agency", I'tidal Mohammed Qaddoura Sharshara, his widow, filed an application requesting the Tribunal, inter alia, to order:

"a. Payment of [a] disability benefit assessed on the basis of 100%, being a result of service incurred accident.

b. Payment of the termination benefits at the UN Operational rate of exchange available at the date of the accident, which resulted in the disability benefit, according to which the Respondent decided to terminate the late husband of Applicant on medical grounds, i.e. US$ = LS 11.20 available on 14 April 1992 (accident date).

c. Payment of secretarial and legal counsel's fees estimated at US$ 1,500."

Whereas the Respondent filed his answer on 29 September 1995;

Whereas the Applicant filed written observations on 29 January 1996;

Whereas, on 14 March 1996, the Respondent submitted an additional document and, on 8 April 1996, the Applicant provided her comments thereon;

Whereas, on 2 August 1996, the Tribunal asked the Applicant to provide documentary proof that she had succeeded to Mr. Sharshara's rights on his death, pursuant to article 2, paragraph (a) of the Statute of the Tribunal;

Whereas the facts in the case are as follows:

The Applicant's late husband entered the service of UNRWA, on 2 February 1973, as an area staff member, as a Driver at the Grade 5 level, in the Syrian Arab Republic (SAR).

On 15 April 1992, the Applicant's late husband was injured at work, breaking his wrist. He was placed on sick leave, from 15 April 1992 through 26 January 1993. On 16 December 1992, a Medical Board concluded that "the [Applicant's late husband] is unfit for further services with the Agency as a Driver. He has developed permanent disability assessed by 16% of whole man". On 20 December 1992, the Field Health Officer concurred in the conclusions of the Medical Board.

On 10 January 1993, the Field Director, SAR, informed the Field Administration Officer, that, unless a post could be found for the Applicant's late husband, whose duties he could perform despite his disability, the Agency would have to terminate his services. In a reply, dated 10 January 1993, the Field Administration Officer advised the Field Director that there were no suitable vacant posts for the Applicant's late husband and that his services should, therefore, be terminated due to the service-incurred disability.

In a letter dated 11 March 1993, the Applicant's late husband requested the Field Director to calculate his disability benefit using the previous exchange rate of LS 11.20 to 1 US$, instead of

LS 26.60 to 1 US$. In a reply, dated 27 March 1993, the Deputy Field Director advised him, "I regret that it is not possible to accede to your request".

On 26 April 1993, the Field Personnel Officer, SAR, informed the Applicant's late husband that the Medical Board had concluded "that you are 'unfit for further service with the Agency,' therefore, your services will be terminated for health reasons under the provisions of Area Staff Rule 109.7, para. 5(c)".

In a memorandum dated 13 May 1993, the Applicant's late husband protested to the Field Director, as follows: "I was not informed of the assessment of my disability until 11 May 1993, when I was requested to sign a letter releasing the Agency of the consequences of the heart problem which I still suffer from. I, therefore, request that the report of the Medical Board be reviewed as none of the Board members was a cardiologist". He submitted with the memorandum a copy of a report from a cardiologist which stated that the Applicant's late husband "suffers a defect in a cardiac muscle".

In a further memorandum of the same date to the Field Director, the Applicant's late husband protested: "I had not been informed of the percentage of my disability determined by the Medical Board until 11.5.93, when I was requested to sign a letter releasing the Agency of any responsibility for the complications of the fracture of my left wrist, ... as the medical board did not include any member specialized in osteology surgery, therefore, I hope that another medical board be formed with a doctor specialized in osteology surgery among its members". With the memorandum, the Applicant's late husband submitted a medical report from a specialist in osteology surgery, which stated: "The injury will result in a permanent disability of 50% of the functions of the wrist".

On 25 May 1993, the Applicant's late husband repeated his request that a new medical board be established, with a specialist

in bone surgery. In a reply dated 2 June 1993, the Officer-in-Charge, Personnel, advised the Applicant's late husband as follows:

> "... it is up to the Agency to determine whether or not a specialist's presence is deemed necessary in the membership of its medical boards as the case may warrant. In your case, where X-rays and other necessary medical reports were available, there was no need for the services of a specialist; nor particularly was there a need for a specialist to assess the disability as this task is carried out by the medical board in accordance with a special international assessment system which is adopted by the Agency."

In a letter dated 22 June 1993, to the Field Personnel Officer, the Applicant's late husband requested access to his medical file and to information on the rules governing the assessment of the extent of his disability. In a reply dated 18 July 1993, the Field Administration Officer informed him that the assessment was based on an international system adopted by UNRWA.

On 18 July 1993, the Applicant's late husband lodged an appeal with the Joint Appeals Board (JAB) relating to both the assessment of the degree of his disability by the Medical Board and the calculation of his benefits using the new exchange rate.

In May 1994, the Applicant's late husband died. His widow continued the appeal.

On 20 July 1994, the JAB adopted its report. Its evaluation, judgement and recommendation read as follows:

> "III. <u>EVALUATION AND JUDGEMENT</u>
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> 19. The Board examined all documents cited before it including all pertinent regulations and rules, particularly rules set out in Parts 3 and 6 of Personnel Directive A/6 governing compensation for injuries and medical boards procedures, and resolved that the Administration has acted in conformity with standing rules regarding the assessment of the percentage of disability incurred by the Appellant during Agency service.

By reference to the Report of the Medical Board convened on 16 December 1992, the Board noted that it states that the Appellant 'has developed permanent disability assessed by 16% of whole man'. In this context, the Board is of the opinion that it cannot substitute its opinion for that of a Medical Board as long as the pertinent rules and procedures have been complied with by the Administration.

The Board also took note of the two medical reports of the orthopaedic surgeons that are submitted by the Appellant and found that both reports indicate that the percentage of disability suffered by the Appellant is 50% (in one of the reports) and 60% (in the other) of the injured arm.

As for the Appellant's request that his termination benefits be calculated using the old exchange rate of US$ 1 to LS 11.209, the Board took note of SAR Field Circular 17/92 dated 5 January 1992 which was effective from 1 January 1992 to 29 February 1992. In this context, the Board resolved that the said Circular does not apply to the Appellant's case, particularly that his accident took place on 15 April 1992 and his services were terminated on health grounds effective 26 September 1993 almost nineteen months after the expiry of the period of application of the Circular.

IV. RECOMMENDATION

20. In view of the foregoing, and without prejudice to the production of further oral or written evidence, the Board unanimously makes its recommendation to uphold the Administration's decisions appealed against; and, that the case be dismissed."

On 2 August 1994, the Officer-in-Charge, Headquarters, transmitted a copy of the JAB report to the Applicant, and informed her as follows:

"You will note that the Board found that the Agency's Administration acted in conformity with standing Rules regarding the assessment of the percentage of disability incurred by your late husband during Agency service. The Board also found that the SAR Field Circular, which exceptionally provided certain staff members who elected to take early voluntary retirement during the first two months of 1992 with the opportunity to have their retirement benefits calculated using the United Nations operational exchange rate of US$ 1.00 to SYP 11.20, had no application in

your late husband's case, particularly since the accident in which he was injured took place on 15 April 1992, and his services were terminated on health grounds effective 26 September 1993, almost 19 months after expiry of the period of application of the Circular.

Based on the above, the Joint Appeals Board unanimously made its recommendation to uphold the Administration's decisions appealed against, and that your late husband's case be dismissed. I accept the findings and recommendations of the Board, and accordingly, the appeal stands dismissed."

On 2 November 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Medical Board which assessed her late husband's disability did not include an orthopaedic surgeon or a cardiac specialist.

2. A new Medical Board should be set up to assess the degree of disability of her late husband, which was 100 per cent.

3. The rate of exchange to be used should be that prevailing at the time of the accident.

Whereas the Respondent's principal contentions are:

1. UNRWA Area staff, like the Applicant's late husband, are not covered by Appendix D or its equivalent.

2. The Applicant's late husband was covered by Area Staff Rule 109.7 which entitled him to the payment of a disability benefit equal to 200 per cent of his final annual salary and cost of living allowance. In addition, he was entitled, under Area Staff Rule 106.4, to annual compensation, to be determined by reference to the worker's compensation or labour law in the SAR.

3. The rate of exchange applicable to all termination benefits, including the benefit payable to the Applicant's late husband, is that prevailing on the date of termination of service.

The Tribunal, having deliberated from 2 to 26 July 1996, now pronounces the following judgement:

I. The Applicant is the widow of an Area staff member. He had served with UNRWA since 1973, until his termination in September 1993, for health reasons. The Applicant's late husband died in May 1994. The Applicant, on her own behalf, seeks payment of a disability benefit awarded to her late husband, assessed on the basis of 100 per cent, arising out of a service-incurred injury. The Applicant's late husband fractured his left wrist in an accident during the course of his work. He was examined by a Medical Board, which decided that he was unfit to work for the Agency as a Driver, that he had "developed permanent disability assessed by 16 per cent of whole man". The Agency did not have any other suitable post for him.

II. The Applicant's late husband sought, and was refused, a new Medical Board containing a cardiologist and an orthopaedic surgeon. He submitted medical reports from orthopaedic specialists in which the degree of disability in his wrist and arm was assessed at 50 per cent and 60 per cent. His requests for access to his medical files prepared for the Medical Board, and information on the rules governing the assessment of his disability, were refused. He was told that it was for the Agency to determine whether a specialist's presence was deemed necessary in a Medical Board. In his case, it was said that, where x-rays and other medical reports were available, there was no need for the services of a specialist and, particularly, there was no need for a specialist to assess the disability, as this task was carried out by the Medical Board in accordance with a special international assessment system, adopted by the Agency.

III. The Applicant's claim to a 100 per cent disability is based on a provision in Area Staff Rule 106.4, paragraph 3, that the amount payable to an injured staff member shall be determined by reference to the worker's compensation law applicable in the Syrian Arab Republic. Syrian law provides for the payment of a lump sum, the amount of which is determined by the permanent impairment percentage of the injured worker. Under that law, the Applicant claims that, as her late husband's accident ended his service, there is entitlement to 100 per cent disability.

The Respondent contends that, while Area Staff Rule 106.4 provides that the amount of compensation payable shall be determined by reference to Syrian law, the determination of the clinical extent of the disability is a matter for the Respondent, pursuant to the Area Staff Regulations and Rules. Once the extent of the disability is determined, reference is made to Syrian law to calculate the compensation payable.

The Tribunal accepts this interpretation.

IV. The Tribunal finds, however, that when the result of the Medical Board's deliberations and findings can lead to the termination of a person's employment and will determine the extent of his subsequent disability payments, due process requires that the person, who is the subject of the Board's enquiry, should be allowed to present relevant evidence, particularly outside expertise, and to have it fully considered. To enable a staff member to present his or her case fully, he or she must also have access to his or her medical files and to information as to the rules on the basis of which the Board makes its findings and assessment. The Applicant's late husband should have been afforded this information.

V. While the Tribunal cannot substitute its judgement for the judgement of the Medical Board with regard to the assessment of

16 per cent, the Tribunal does find that the procedures of the Board were flawed and the Applicant's late husband was, thereby, denied due process.

VI. The Applicant also contends that the Respondent failed to make payment at the United Nations operational rate of exchange available at the time of the accident. The Applicant argues that separation benefits are paid in US dollars. There is some disagreement as to whether a more favourable rate of exchange was still in force at the time of the accident, but the Tribunal notes that this matter need not be resolved because the date of the accident is not the relevant date for this purpose. The Tribunal agrees with the Respondent's contention that the relevant date is 26 September 1993, the date of termination. There is no question as to the exchange rate on this date.

VII. For the foregoing reasons, the Tribunal finds in favour of the Applicant.

Because of the death of the Applicant's husband, further questions have to be determined.

The Tribunal is satisfied that, following the death of her husband, the Applicant was entitled to pursue the Appeal in her own interest and that of any other beneficiary of her late husband's estate.

The documents furnished to the Tribunal, following the Tribunal's request under article 2, paragraph (a) of its Statute, indicate that the Applicant's late husband was survived by not only the Applicant, but also their children.

The Tribunal, therefore, orders that the sum of $5,000.- be paid to the estate of the Applicant's late husband.

All other pleas, including the Applicant's request for costs, are rejected.

(Signatures)

Hubert THIERRY
Vice-President, presiding

Francis SPAIN
Member

Deborah Taylor ASHFORD
Member

Geneva, 26 July 1996

R. Maria VICIEN-MILBURN
Executive Secretary